D & W Food Centers, Inc. *and* Debbie Vanderwall. Case 7–CA–29505

November 8, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 14, 1990, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an exception and a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.

We agree with the judge that the General Counsel made out a prima facie case that a reason for the discharge of employee VanderWall was protected concerted activity[1] Thus, Store Director John Dykhouse was motivated in part by VanderWall's having engaged in this activity when he permitted Dawes to seek higher management's permission to terminate VanderWall. That is evidenced by the contents of the correction report Dykhouse wrote in connection with the discharge. Unlike our dissenting colleague, however, we also agree with the judge that the preponderance of the evidence shows that VanderWall would have been discharged even in the absence of her protected concerted activity.

One of VanderWall's responsibilities as a General Service Clerk S-12 was opening checkout lanes and keeping them open as needed. She was derelict in this duty. In February 1989 she received a correction report for her failure to open lanes and keep them open as she had been instructed. She was entered into a formal counseling program by the Respondent to correct this problem, and was warned that further infractions could result in a disciplinary layoff or discharge. In her evaluation in April 1989, she was rated ''below average'' in ''Initiative,'' and was again criticized for her failure to open lanes as needed. There is persuasive evidence from Dawes, other supervisors, and other employees that this dereliction of duty by VanderWall continued. The credited testimony of Dawes shows that on June 15, Dawes had to operate a lane for 45 minutes while VanderWall was talking to other employees and neglecting her own duties, despite Dawes' repeated instructions for her to open lanes. On June 16, Dawes recommended to John Dykhouse that VanderWall be terminated for this conduct. John Dykhouse told Dawes to seek permission from higher management, Robert Dykhouse. Robert Dykhouse gave that permission and VanderWall was discharged on that same day.

Based on the above evidence, we agree with the judge that the Respondent has shown by a preponderance of the evidence that it would have discharged VanderWall even in the absence of any protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980). VanderWall had been warned twice before about a failure to keep the lanes open, and indeed she had been told that repetition of this conduct could result in her discharge. Her protected concerted activity occurred in early June. She was not discharged until June 16, *the day after she repeated the misconduct of failing to keep the lanes open*. In these circumstances, we agree with the judge that she would have been discharged even if she had not engaged in protected concerted activity. Accordingly, we will dismiss the allegation of the complaint alleging the unlawful discharge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent D & W Food Centers, Inc., Walker, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as modified[2] by substituting the following for paragraph 2(a):

''(a) Post at the Respondent's store number 218 in Walker, Michigan, as well as its other stores where it employs employees who had received the handbook

[1] We agree with the judge that employee VanderWall's early June telephone call to the Respondent's director of human resources, Terveen, was protected concerted activity. We therefore find it unnecessary to reach the issue of whether VanderWall's submission of 15 questions to Assistant Store Director Dawes on June 8, 1989, also constituted protected concerted activity.

[2] The General Counsel excepts to the recommended Order provision which requires posting of the notice only at Respondent's Grandville, Michigan store. Assertedly the handbook containing the unlawful work rule was distributed to employees in all the Respondent's stores. In a letter to the Board dated November 30, 1990, the General Counsel contends that the Respondent's answering brief dated November 26, 1990, implicitly acknowledges that the notice should be posted ''at all stores where the unlawful handbook was distributed.''

However, Respondent contends that the handbook was changed and sent, inter alia, to new stores, i.e., stores at which the unlawful handbook was never distributed. Respondent argues that there is no need for a notice at these new stores. In response, the General Counsel contends that some ''old store'' employees (who saw the unlawful handbook) may now work at the new stores. Because there is insufficient evidence on this matter, we leave it to compliance.

The Respondent excepts to the judge's refusal to allow testimony relating to VanderWall's alleged postdischarge misconduct thereby rendering her reinstatement inappropriate. We find it unnecessary to reach this issue because we adopt the judge's finding that the Respondent did not unlawfully terminate VanderWall.

containing the unlawful provision, and at its principal offices in Grandville, Michigan, copies of the attached notice marked ''Appendix.''[13] Copies of that notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt, and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that this notice is not altered, defaced or covered by any other material.''

MEMBER OVIATT, concurring in part and dissenting in part.

I agree with the majority except that I would find that the Respondent violated Section 8(a)(1) of the Act by discharging Debbie VanderWall for engaging in protected concerted activity.

As the judge found, VanderWall engaged in protected concerted activity when, about 8 to 10 days before her discharge, she called the Respondent's director of human resources, Terveen, and complained on her own behalf and that of other employees, about the transfer of employee DeVries from another store to the store where VanderWall worked. Terveen told VanderWall he would check on it, and he did call Assistant Store Director Dawes and discuss the matter.

On June 16, 1989, Dawes recommended to Store Director John Dykhouse that VanderWall be terminated for her recurring failure to open checkout lanes as needed. John Dykhouse told Dawes to seek permission from Senior Vice President of Operations Robert Dykhouse to terminate VanderWall. Dawes received permission, and VanderWall was terminated that day by John Dykhouse, with Dawes present. A correction report signed by John Dykhouse stated as follows:

> This week Deb has been asked on numerous occasions to jump on a lane in reference to giving better customer service. During these moments she has complained to other associates concerning another associate being able to come to our store to fill a position in reference of an opening at our courtesy desk. Deb received a verbal warning approximately 5 weeks ago that this type of behavior cannot go on. As store director, I make these decisions, not Deb. Deb has too often administered the informal negative norm and this disrupts our front end operation. This store will no longer put up with this kind of behavior. Her past record overall is not good and improvement concerning past negative incident reports have [sic] not occured [sic].

Based on this evidence, the judge found that the General Counsel had made out a prima facie case that VanderWall had been fired unlawfully for engaging in protected concerted activity, and that the burden then shifted to the Respondent to show that it would have taken the same action in the absence of the protected activity. The judge then found that the Respondent had met its burden, based on evidence of VanderWall's recurring failure to open lanes, and the credited testimony of Dawes that she recommended the termination because of that problem. He thus found that the Respondent would have terminated VanderWall even in the absence of the protected activity, and he dismissed that allegation of the complaint. I disagree with this latter finding.

As the judge found, it was John Dykhouse who told Dawes to seek permission to terminate VanderWall, and it was he who terminated VanderWall and signed the correction report showing the reasons behind the discharge. The unlawful motivation behind his actions is clearly shown in the wording of the report.

There is evidence that there were shortcomings in VanderWall's work performance for which she had been counseled and threatened with adverse action including layoff or discharge. Nonetheless, she was considered overall to be at least a ''good'' employee, as evidenced by her evaluations, and she had received several favorable incident reports, one only 10 days before her discharge. Although Dawes recommended that she be discharged on June 16 for not opening checkout lanes as expected, there is insufficient evidence to show that she would have been terminated at that time based on Dawes' recommendation. Rather, the evidence shows that John Dykhouse seized upon Dawes' recommendation that VanderWall be terminated as an opportunity to rid the store of an employee whom he thought did not properly respect his authority. The failure to respect his authority, however, was protected.

Dawes did not make the decision to terminate, John Dykhouse did. Robert Dykhouse, who authorized the termination, did not testify, and there is no evidence concerning the conversation between Dawes and Robert Dykhouse. Therefore, the only credited evidence before us showing the motivation for the termination is the June 16 correction report, correctly found by the judge to show—indeed it asserts—an unlawful motive. I therefore find that the Respondent failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980). Accordingly, I would find that VanderWall was discharged in violation of Section 8(a)(1).

Joseph P. Canfield, Esq., for the General Counsel.
Marshall W. Grate, Esq. and *Leo Litowich, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Grand Rapids, Michigan, on January 22 and 23, and February 21, 1990, pursuant to an amended complaint issued November 3, 1989, alleging D & W Food Centers, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Debbie VanderWall and by publishing and enforcing a rule concerning the solicitation of employees to join a union or ''sign a card.'' Respondent, in its answer to the amended complaint, denies the commission of unfair labor practices, and raises an affirmative defense to the effect there is no charge to support the allegation of an unlawful rule. This affirmative defense has no merit because an amended charge filed on October 13, 1989, alleges the rule to be unlawful.

On the entire record,[1] and after carefully considering the comparative testimonial demeanor of the various witnesses, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is a Michigan corporation with principal offices and place of business in Grandville, Michigan, and is engaged in the retail sale of groceries and other items at several locations in Michigan. Respondent's store 218 in Walker, Michigan, is the facility involved here. During the calendar year ending December 31, 1988, Respondent derived gross revenues exceeding $500,000 from the retail sales described above, and purchased and caused business merchandise valued at more than $50,000 to be delivered directly to its Walker, Michigan store from suppliers located outside the State of Michigan. Respondent is, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. SUPERVISORS

The parties agree the following named individuals occupied the positions set after their names up to and including the time of VanderWall's discharge,[2] and at all times material to this proceeding have been supervisors and agents of Respondent within the meaning of the Act:

Wayne Terveen	Director of Human Resources
Chuck Fausnaugh	Chief Operations Officer
Doug Blease	Vice President of Human Resources
Robert Dykhouse	Senior Vice President of Operations
Peter Visser	District Superintendent of Walker Store 218
John Dykhouse	Store Director of Walker Store 218
Patricia Dawes	Assistant Store Director
James Perkins	Store Service Manager
Chelle Markowski	Assistant Service Manager
Carol Downer	Assistant Service Manager

III. THE ALLEGED UNFAIR LABOR PRACTICES[3]

A. *The Rule*

Respondent maintained the following rule in its associate handbook[4] from the 1970s until November 13, 1989, after the amended complaint issued:

> If anyone should cause you trouble at work or exert pressure to join a union or sign a card, you should tell the store director about this so the activity can be stopped. D & W will always protect your rights and those of our customers under applicable laws.

Respondent acknowledges in its posttrial brief that such employer statements have been held to be unfair labor practices, citing *NLRB v. Colony Printing & Labeling*, 651 F.2d 502 (7th Cir. 1981), and *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676 (4th Cir. 1980). Even so, urges the Respondent, in the absence of any evidence the rule was enforced a cease and desist order should not issue with regard to the rule because Respondent promptly revoked it on the issuance of the amended complaint herein. Respondent directs attention to *Greencastle Mfg. Co.*, 234 NLRB 272 (1978); *NLRB v. Furnas Electric Co.*, 463 F.2d 665 (7th Cir. 1972); and *Deringer Co.*, 201 NLRB 622 (1973).

Although General Counsel filed a brief concerning the treatment of VanderWall, he makes no argument in support of the complaint allegation concerning the aforementioned rule. Notwithstanding this failure by General Counsel to assist in the determination of this issue, a rather unusual stance, it is my duty to determine whether the evidence supports the allegation and whether Respondent's able argument should prevail.

I agree with Respondent's suggestion that the rule is invalid for reasons explicated in the court decisions *Colony Printing* and *J. P. Stevens*, both of which enforce Board orders, and conclude its maintenance during the period covered by the charge and complaint violated Section 8(a)(1) of the Act. With respect to the necessity for a remedy, it is true there is no showing the rule has ever been enforced, and it is also true that Respondent issued the following memo to

[1] Errors in transcript have been noted and corrected.

[2] At the time of the hearing job titles of some of these persons had changed as follows, but all remained statutory supervisors and agents of Respondent:

Wayne Terveen	Store Director
Chuck Fausnaugh	President
Robert Dykhouse	Vice President of Store Development
Peter Visser	Store Director
Patricia Dawes	Cultural Coordinator

[3] The conclusions of fact are based on the credible portions of testimony of the participants and the documentary evidence received. In those instances where conflicts in testimony arose I have considered the reasonable probabilities, the convincing character of the testimony, and comparative demeanor of opposing witnesses. Testimony that might appear to conflict with my findings of fact has been examined and rejected as less credible than that on which I have relied. I have credited parts of witnesses' testimony while not crediting other parts. This is neither unusual or improper. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950), vacated on other grounds 340 U.S. 474 (1951).

[4] Respondent refers to its employees as associates.

its employees on November 13, 1989, with the form and revisions referred to therein attached.

> Dear Associate:
>
> Because of some recent changes in our operation several revisions have been made to our associate handbook. The five revisions include: premium pay, sick pay, holiday pay, associate rights, and associate insurance benefits.
>
> In early 1990 we will be publishing a new associate handbook—which we will provide to you at that time.
>
> Please read and sign the attached form and return it to your supervisor.

The attached form reads:

> D & W ASSOCIATE HANDBOOK CHANGES
>
> By my signature on this form I signify that I have received the new or revised information listed below. I also understand that it is my responsibility to read and place this information in my D & W Associate Handbook.
>
> _____ _____ _____
> Store # Signature Date
>
> ADDITIONS OR REVISIONS
>
> | | |
> |---|---|
> | Holiday Pay/Personal Holiday Pay | pages 40 & 41 |
> | Sick Pay | page 42 |
> | Associate Rights | page 14 |
> | Associate Insurance Benefits | page 48 |
> | Premium Pay | page 37 |

The rule at issue appeared as the last paragraph of the section entitled ''Associate Rights'' at page 14 of the Handbook. The Associate Rights section on the page 14 attached to the November 13, 1989 memo no longer contains this paragraph.

Unlike the solicitation and/or distribution rules dealt with in *Greencastle*, supra, *Furnas*, supra, *Deringer Co.*, supra, and *Bellinger Shipyards*, 227 NLRB 620 (1976), the rule here at issue is, as Respondent recognizes, on its face violative of the Act because it does not distinguish between lawful organizing and coercive conduct and urges employees to report anyone who should ''exert pressure to joint a union or sign a card.'' Here as did the letter in *Colony Printing & Labeling*, 249 NLRB 223, 225 (1980), enfd. 651 F.2d 502 (7th Cir. 1981), Respondent's rule had ''the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities,'' and therefore violated Section 8(a)(1) of the Act. Accord: *Kendall College of Art*, 288 NLRB 1205, 1208 (1988); *Bay State Ambulance Rental*, 280 NLRB 1079, 1083 (1986). This rule has been maintained since the 1970s and constituted a serious restriction of employee rights. Compare *St. Vincent's Hospital*, 265 NLRB 38, 42 (1982), with respect to the long-term maintenance of an overly broad rule prohibiting the wearing of union insignia. The rule in this case is clearly at least as serious an infraction as a prohibition against union insignia. Respondent's November 13, 1989, memo merely advised that revisions had been made to the handbook concerning, inter alia, associate rights due to recent changes in Respondent's operation, and then attached a new statement on associate rights deleting the last paragraph thereof which is the rule in issue. In my view, simply excising the printed rule and attributing the excision to a change in operations, which is not true, does not effectively advise the employees it has been repudiated and that they are not requested or encouraged to report card soliciting or other lawful union organizing to their superiors, and are free to join unions and sign union authorization cards if they so desire. I therefore conclude that a remedial order is required to cure the effects of the long-term maintenance of this rule.

B. *Termination of Debbie VanderWall*

1. Relevant documents

Debbie VanderWall started to work for Respondent in 1986 as a service clerk at its Walker, Michigan store, and progressed to the position of general service clerk S-12 which she held until her discharge on June 16, 1989.[5] As a service clerk she received favorable incident reports[6] on January 26 and March 17, 1987, for coming in to work on very short notice and working late in place of absent employees. After her promotion to the S-12 level she received a favorable incident report and was nominated for associate of the month on February 5, 1988, for the same reason. On December 3, 1988, and January 21 and June 6, 1989, she was given favorable incident reports. Each time she had come to work and worked hard and long on short notice to fill in for absentees. The 1988 reports make reference to her excellent work at the candy racks. The June 6 report again nominates her for associate of the month.

As an S-12 she received an unfavorable incident report on September 7, 1988, for horseplay involving placing a broom on the automobile of Supervisor Carol Downer. She was warned by Department Manager Perkins that such conduct was unprofessional, the next offense would result in a 3-day layoff, and a third offense could result in discharge. On February 2, 1989, she was issued a correction report, was entered into Respondent's counseling program, and was warned of a layoff and/or discharge for further infractions. This report is based on her practice of closing down checkout lanes after being several times instructed to open a lane and keep it open. Another correction report was given to her on March 2, 1989, for horseplay[7] consisting of the placement of a package of Twinkies on the car of Downer. For this VanderWall received a 3-day layoff. She signed all three of these reports. Finally, she was terminated on June 16 and a correction report signed by Store Director John Dykhouse issued stating: ''This week Deb has been asked on numerous

[5] All dates are 1989 unless otherwise noted.

[6] The form used is dual purpose and is utilized both to commend via favorable incident report and criticize via unfavorable incident or correction report.

[7] VanderWall's penchant for less than innocent horseplay is further displayed by her conduct in stapling the sleeves and waist band of another employee's coat whom she considered rude. She apologized to the employee for this conduct when called into the store director's office about it.

occasions to jump on a lane in reference to giving better customer service. During these moments she has complained to other associates concerning another associate being able to come to our store to fill a position in reference of an opening at our courtesy desk. Deb received a verbal warning approximately 5 weeks ago that this type of behavior cannot go on. As store director, I make these decisions, not Deb. Deb has too often administered the informal negative norm and this disrupts our front-end operation. This store will no longer put up with this kind of behavior. Her past record overall is not good and improvement concerning past negative incident reports have not occured [sic].''

D & W Associate Performance Evaluation reports for VanderWall contain the following information. As a service clerk she had no lane opening duties and received very good to excellent ratings. From her first rating as an S-12 in August 1987 through October 27, 1988, she was evaluated as very good the first three times in 1988, then excellent on October 27, 1988. On April 21, 1989, her overall evaluation dropped to good. This evaluation by Perkins rates her below average in initiative and notes ''We are constantly asking you to run a lane. You know when you should and we need you to do so,'' and concludes, as areas for improvement, ''Deb, you know when you should be on a lane. We need you to watch those lanes and open up immediately when you are needed. You are looked up to by service clerks and we need you to set the example for them to follow. Promote teamwork—don't talk about other people, that is how rumors start. Don't stand and talk when it gets slow. Focus on your responsibilities. You know what is expected of you, you simply need to apply yourself.'' This evaluation and the others are signed by VanderWall.

2. Conduct of VanderWall and others leading to this proceeding

Among VanderWall's job responsibilities, which included operating a checkout lane as necessary, were the controlling of breaks taken by service clerks and making sure the service clerks were kept busy at their work.[8] Her uncontroverted and not improbable testimony that service clerks often brought work related problems to her, and that Assistant Store Director Dawes knew this, compared her to a mother hen with chicks, and advised her that she should refer the clerks to management personnel for answers to their problems is credited. Reading the record carefully it seems quite clear that VanderWall was given to complaining to all who would listen concerning matters that irked her. Her testimony and that of others further shows that she usually sought to involve others in matters of concern to her, and was a bit of a busybody in this regard who sometimes spent worktime talking to other employees about personal concerns when she might better have been engaged in necessary work, e.g., running a checkout lane. Respondent knew from its experience with VanderWall that she frequently did in fact discuss work-related concerns with other employees.

Moving on to early June, according to VanderWall she discussed the transfer of Deann DeVries from another store to the position of courtesy clerk at the Walker store with Amy Quist, Pam Mason, and Joanne Ogden. She asserts that she believes it was Mason who mentioned calling the corporate office to find out what was going on, and recalls that Mason said, ''O.K.'' when VanderWall later said she would make the call. Mason did not testify and VanderWall is credited with respect to her conversation with Mason.

VanderWall claims that before making the call she talked to Amy Quist on the phone and asked if she knew if DeVries was available for the transfer because she had earlier talked to Quist about this. Quist advised her of the days DeVries was available. Quist, a courtesy clerk at the Walker store, recalls that VanderWall spoke to her about the transfer and said she was not happy with it and was going to call the corporate office and complain. Quist testifies that she neither agreed or disagreed with VanderWall, and had no telephone conversation with her on the matter until a month before the trial when VanderWall asked her to speak to VanderWall's lawyer. I believe the testimony of Quist and VanderWall is complementary and conclude that VanderWall spoke to Quist, although not on the phone, expressed her disgruntlement with the transfer, asked for and received information regarding DeVries' availability for the job, told Quist she would call corporate management, but did not succeed in enlisting Quist in her cause.

Joanne Ogden, a courtesy clerk at the Walker store, testified that VanderWall, upset over DeVries' transfer, said she had called the corporate offices over the matter, wanted a bunch of people to call the office, and gave Ogden a piece of paper with the corporate phone number on it. Ogden made no call. She recalls little else about the conversation, but specifically denies asking VanderWall to call the corporate offices. VanderWall merely says she ''talked a little bit with Joanne Ogden,'' and denies saying anything about the corporate office when she talked to Ogden. I credit Ogden's version and conclude that VanderWall attempted unsuccessfully to solicit Ogden's support for the complaint about the DeVries transfer.

VanderWall called Wayne Terveen, Respondent's Director of Human Resources at the time, on June 6, 7, or 8.[9] Her version is that she said Walker store employees including her questioned the DeVries transfer because several Walker employees could use the extra hours and could do the job, and because DeVries had limited availability, and some employees and she thought DeVries' mother arranged the transfer. Terveen's reply, says VanderWall, was that he would check and call back. Terveen testified that VanderWall was concerned about DeVries' transfer, but he gives no details of the conversation other than that he told her that he would look into it and she should take her concerns to her store management. He definitely recalls however that she did not advise she was representing others when she called. This is the only portion of his testimony that can fairly be characterized as a partial rebuttal of VanderWall's testimony. VanderWall's definite and certain recitation of what was said during the conversation had the ring of truth and is entitled to credit. In arriving at this conclusion I have noted that Dawes, a matter-of-fact, certain, composed, and believable witness even under stiff cross-examination, credibly testified that

[8] No one alleges or contends VanderWall was a statutory supervisor. Respondent refers to S-12 as a nonsupervisory lead position. I therefore need not examine her status further.

[9] VanderWall and Terveen place it on June 7 or 8. Dawes recalls Terveen calling her about it on June 6. The exact date is not important.

VanderWall was very upset when she learned of DeVries upcoming transfer to the Walker store, and during several conversations with Dawes expressed a fear her work hours would be cut as a result. These discussions only concerned VanderWall's personal feelings on the matter, but this does not mean other employes were not similarly concerned or had not discussed it with VanderWall.

Terveen called Dawes and told her VanderWall had called and was concerned about the DeVries transfer. Dawes explained the transfer was necessary.

VanderWall had voiced concerns about several other matters in May and June. Dawes told her to put them on ''hot line'' cards. The company provides these cards for employees to use in submitting questions and concerns to management. On or about June 8, finding no hot-line cards available, VanderWall used other pieces of paper to submit 15 questions about working conditions. She left these slips on Dawes' desk. VanderWall had gathered some of the questions from other employees, but concedes she did not advise the company from whence she got them. She told Dawes that she had concerns she wanted answered, and did not tell her anyone else but VanderWall was involved in posing the questions. She recalls the following were among the questions asked: ''Why do Managers only tell us when we do something wrong, instead of when we do something right?'' and ''Why do we have to cover the hours when Managers schedule us when we can't work?'' I do not agree with General Counsel's suggestion that because VanderWall used the words ''us'' and ''we'' in such questions Respondent was put on notice the questions were the product of concerted activity, nor does the mere use of the words operate to further corroborate VanderWall's claim, which is however credited solely because it is uncontroverted, that others had a hand in composing the questions.

VanderWall again called Terveen on June 15. This time she complained of the conduct of Deann DeVries' mother who was a customer. VanderWall credibly recalls she advised Terveen that this lady had told her she was not nice and would get fired if not careful, that this lady had made rude comments about Supervisor Sue Mingerink's private life, and had said employee James Parzych's father deserved bypass surgery. She did not advise she was calling on their behalf. Terveen told her he would tell Dawes and John Dykhouse of these matters, and she should talk to John Dykhouse about it. He then called Dawes and advised that she and John Dykhouse should look into the matter. Dawes credibly testified VanderWall had angrily demanded of her that DeVries' mother be thrown out of the store for her comments to VanderWall. Dawes rejected this request.

Parzych, an S-12 at Walker, denies saying anything to VanderWall about his father's surgery because it did not take place until after her discharge, and recalls that, when VanderWall asked about his conversation with Mrs. DeVries, all he said was that she would corner you and ask questions that were none of her business, but he just ignored it. He denies any discussion with VanderWall about calling the corporate office. I credit Parzych who had no direct interest in the proceeding and had no perceptible reason to fabricate. The record does not establish concert between him and VanderWall in this instance. Mingerink did not testify, but VanderWall states that she told Mingerink what Mrs. DeVries had said about her, and further advised she was calling the corporate office. To this Mingerink allegedly replied, ''Let me know what they say.'' Inasmuch as Mingerink took Carol Downer's place as an assistant service manager and statutory supervisor at the Walker store, and held that position at the time of this conversation, the rule that an employee cannot engage in concerted activity with a supervisor is controlling. *Capital Time Co.*, 234 NLRB 309 (1978). Moreover, the casual request that VanderWall let Mingerink know the company's response to her call is not, in my view, sufficient to constitute concerted activity.

VanderWall was terminated on June 16. That morning Dawes called John Dykhouse and recommended VanderWall be terminated because her performance was not improving and was unacceptable on June 15, and the counselling program with her was not working. The February 2 correction report issued to VanderWall and her April 21 evaluation criticize her failure to operate checkout lanes as her duties required. Fellow employee Parzych reports that VanderWall did not like to open checkout lanes, had to be told by supervision to do so, would close lanes too soon, and sometimes would find other things to do when directed to open a lane. Cashier Karen Plaska's testimony and that of Supervisors James Perkins, MIchelle Markowski, and Carol Downer are to the same effect. This history is persuasive evidence that VanderWall was derelict in her duties for a long period of time with respect to operating checkout lanes. Dawes credibly testified that she thoroughly discussed the duties of S-12s to voluntarily open lanes when necessary at meetings of employees in 1988 and 1989 which were attended by VanderWall. Dawes' testimony that her recommendation to terminate VanderWall was precipitated by VanderWall's continued failure to work on lanes unless specifically directed to so do during the week preceding the discharge is also credited. John Dykhouse told Dawes to seek permission to terminate VanderWall from Robert Dykhouse, Respondent's vice president of operations. Dawes then contacted Robert Dykhouse and received permission to terminate VanderWall. That afternoon VanderWall was called into John Dykhouse's office and terminated in the presence of Dawes.

The reasons assigned by Dykhouse are set forth in the June 16 correction report and recited above in section III,B,1 of this decision. Although Dawes recommendation was based on VanderWall's failure to properly mind the checkout lanes on June 15, the June 16 correction report issued by John Dykhouse shows that he was motivated in considerable part by VanderWall's protest of his decision to award the courtesy clerk job to DeVries. He plainly considered VanderWall's conduct in that matter as a challenge to his authority not to be tolerated.

3. Discussion and conclusions

The Board set forth the controlling rule in *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, as follows:

> In general, to find an employee's activity to be ''concerted,'' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the ad-

> verse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

On remand from the United States Court of Appeals for the District of Columbia Circuit,[10] the Board further explained:

> We reiterate, our definition of concerted activity in Meyers I encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.[11]

I agree with General Counsel that VanderWall had a history of discussing work-related matters of mutual concern with other employees. That Respondent was aware of this protected concerted activity through its Supervisor and Agent Dawes, who compared VanderWall to a mother hen with chicks and advised her to refer employees with such concerns to management, is clear. It is not clear however that Respondent *always* knew or had reason to believe that all the complaints or questions she addressed to Respondent were the products of concerted activity. An example is the incident of the 15 questions. There VanderWall and other employees engaged in the concerted activity of compiling questions for Respondent to answer, but the evidence does not show Respondent knew the questions rose from a concerted effort.

The call to Terveen regarding the transfer of Deann DeVries is a different matter. Another employee suggested to VanderWall that she make the corporate call, Mason's ''O.K.'' was an expression fairly connoting acquiescence and tacit agreement to VanderWall's plan to make the call, and VanderWall solicited Ogden to join in the effort by herself calling the corporate offices. When VanderWall adopted the suggestion she make the call she was then in concert with the person so suggesting, Mason's ''O.K.'' confirms there was concert, and VanderWall's effort to induce Ogden to join her in calling management is also concerted activity within the definitions in *Meyers I* further explained in *Meyers II*. I have credited VanderWall that she told Terveen she and other employees were questioning the DeVries transfer on various grounds including the wish that the hours that would be assigned to DeVries might rather be given to them. Terveen thus knew VanderWall was engaged in concerted activity as a spokesman for other employees as well as herself seeking to preserve additional working hours, and thus wages, for themselves rather than the transferee. There is no evidence the phone call to Terveen nor VanderWall's conversations with Mason, Quist, or Ogden disrupted any employee's work. That VanderWall was not as diligent as she might have been in some aspects of her work performance has no bearing on the protected nature of her phone call.

I have concluded that VanderWall's call of Terveen regarding the DeVries transfer was protected concerted activity. I further conclude that General Counsel has made out a prima facie case that VanderWall was discharged because she engaged in such activity. This is so because, although I believe Dawes sought VanderWall's termination because her work performance was patently below par, it was John Dykhouse who gave Dawes permission to seek permission from Robert Dykhouse to separate VanderWall, and it was John Dykhouse who clearly indicated in writing his displeasure with VanderWall's call to Terveen as a portion of the reason to terminate her. Dawes does not say what conversation went on between her and Robert Dykhouse when she called for permission to discharge VanderWall. Robert Dykhouse did not testify. A conclusion that John Dykhouse's resentment at VanderWall's call to Terveen, which John Dykhouse viewed as an unwarranted questioning of his sole authority regarding the Devries transfer, was a motivating factor in his decision to permit Dawes to recommend VanderWall's termination is therefore warranted on the evidence before me. General Counsel has made out a prima facie case. The burden now shifts to Respondent to show by a preponderance of the evidence it would have taken the same action had VanderWall not engaged in protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The February 1 warning of possible layoff and/or discharge if VanderWall continued her unsatisfactory performance with respect to minding checkout lanes, her 3 day layoff for horseplay on March 2, and the admonition on her April 21 evaluation regarding her failure to correct her conduct with respect to working on the lanes, as described by both coworkers and supervisors, establish a pattern of unsatisfactory work and a failure to improve after warning and counselling. Dawes credibly testified that she herself had to operate a checkout lane on June 15 because VanderWall, who was punched in to work, was off talking to other associates for 45 minutes when she should have been paying attention to and working on checkout lanes, one of the main responsibilities of an S-12. Noting the comments of various witnesses concerning VanderWall's attitude toward the checkout lanes, her acknowledgement that she was told by Dawes three times on one day, VanderWall says June 9, to open checkout lanes, Dawes credible testimony she had to call VanderWall to open a lane three times on June 15, VanderWall's incredible testimony that it was not clear to her what she was supposed to do with respect to opening checkout lanes even after her February 1 warning, and the clear evidence she made no effort to correct her work habits after warnings and counseling, I am persuaded Respondent has shown by a preponderance of the evidence she would have been discharged pursuant to Dawe's report on her failure to satisfactorily perform her work on June 15 even if she had not engaged in concerted activity.

Respondent has therefore met its *Wright Line* burden, and General Counsel has not proved by a preponderance of all the evidence that VanderWall's termination was violative of the Act.

CONCLUSIONS OF LAW

1. D & W Food Centers, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act by urging employees to inform Respondent if they are pressured to join a union or sign a union authorization card, and by inviting and encouraging them to report the

[10] *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

[11] *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*.

identity of union card solicitors to Respondent's supervisors and agents.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not commit an unfair labor practice by terminating Debbie VanderWall.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, D & W Food Centers, Inc., Walker, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Urging its employees to inform Respondent if they are pressured to join a union or sign a union authorization card, or inviting or encouraging them to report the identity of union card solicitors to Respondent's supervisors and agents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent's place of business in Grandville, Michigan, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director within 20 days from the date of this Order what steps Respondent has taken to comply with this Order.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT urge our employees to tell us if they are pressured to join a union or sign a union authorization card, and WE WILL NOT otherwise invite or encourage them to report the identity of union card solicitors to supervisors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

D & W FOOD CENTERS, INC.